No. 79-1799

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

BERNARD LAUFGAS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The State of New Jersey respectfully opposes the issuance of a writ of certiorari to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on October 22, 1979.

QUESTIONS PRESENTED

I. Does the due process clause of the Fourteenth Amendment to the United States Constitution require a public college to provide a hearing to a non-student who has been conditionally excluded from campus where that non-student has been tried and convicted for violation of State law?

II. Was the letter constituting the foundation of the trespass an educational record within the meaning of 20 U.S.C.A. §1232(b)(2)(B), and in any event did its introduction into evidence violate said provision when the information contained therein had previously been released by an independent source?

III. Does petitioner demonstrate grounds sufficient to justify a grant of the writ of certiorari?

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COUNTER STATEMENT OF THE CASE[1]

According to the State's proofs, defendant-petitioner, a student at the Ocean County College, had complained to Dean Kerr sometime in September 1977 about the college's lack of attention to and support of the cross country team and was critical of Dean Kerr's handling of the problem. This and other complaints continued during the semester with defendant making demands of the college and having confrontations with students and college staff. Reports were received of defendant's threatening and abusive manner and conduct and in November 1977 defendant was placed on probation for disrupting a college recruiting function. Defendant left Ocean County College. Notwithstanding the fact that defendant was no longer a student at the college, he returned to the campus the following semester and threatened a student. As a result, Dean Kerr wrote to defendant on February 3, 1978, banned him from the campus, and warned him that he would be considered a trespasser if he came upon the campus without permission (RA1-2).[2]

On February 7, 1978 defendant, without prior permission, entered upon the college campus and charged into Dean Kerr's office, screaming obscenities and berating him for having sent the letter.

As a result of this behavior, Dr. Kerr filed a complaint in the Dover Township Municipal Court against defendant, charging him with being a disorderly person in violation of N.J.S.A. 2A:170-31; N.J.S.A. 2A:170-29(2)(b); and N.J.S.A. 2A:170-26. The specific acts charged respectively were: (1) trespassing on the campus of Ocean County College after having been forbidden to do so; (2) entering Dean Kerr's office to

1. The State relies substantially upon the facts as presented in the decision of the Superior Court of New Jersey, Appellate Division, and reproduces portions of the same herein.

2. "RA" refers to Respondent's Appendix.

annoy and molest him; and (3) assaulting Dean Kerr by "repeatedly point(ing) his finger into the face of the Complainant." Defendant was found guilty in the Municipal Court of the Township of Dover on all three charges and was fined $50 for each conviction, plus costs. Defendant also was given a suspended seven days sentence on each conviction and placed on unsupervised probation for two years on the condition that he not enter the college grounds or campus or interfere in any way with the students or faculty thereon (RA3-5). Defendant appealed to the Ocean County Court where, after a trial *de novo* on the record below, he was acquitted of the assault and found guilty of trespass and "offensive language." The county court judge acquitted defendant of assault concluding that "shaking his fingers in the face of someone else during the course of an argument . . . does not constitute assault." Defendant again was fined $50 plus costs for each conviction (RA6-8).

Notice of appeal was filed with the Appellate Division of Superior Court on October 2, 1979. On October 22, 1979, the Appellate Division in a per curiam opinion affirmed the Township conviction but reversed the county court judgment which found defendant guilty of a violation of 2A:170-29(2)(b). The Court found that the county court judge relied upon that portion of the statute charging offensive language [N.J.S.A. 2A:170-29(1)] which was not the statute charged (RA8-17). Thereafter, a petition for certification was filed with the New Jersey Supreme Court on November 5, 1979 and denied on February 11, 1980 (RA18).

REASONS FOR DENYING THE WRIT

I.

No violation of due process occurred as the defendant was not entitled to a formal hearing before he was conditionally banned from Ocean County College Campus; in any event any such right was waived by defendant's subsequent illegal conduct after notification.

Petitioner urges this Court to issue a writ of certiorari alleging that his conditional access to a college campus, of which he was notified by the Dean of the college, violates the due process clause of the Fourteenth Amendment of the United States Constitution. He contends that a college funded by the State cannot under any circumstances deny a person unlimited access to its facilities. The State respectfully submits that based upon the facts and the laws of this State as discussed *infra,* defendant's argument lacks merit.

At the outset it must be noted that defendant, while attending the college, was disruptive and on more than one occasion verbally threatened others with bodily harm. As a result he was placed on disciplinary probation. Thereafter he withdrew from matriculating but came onto the campus and continued his belligerent activities. He was then formally notified that in order to insure the safety of the student body and to insure that curricular activity could continue undisturbed, he was required to obtain permission to use the college facilities (RA1). After receipt of this notification he immediately entered the campus and verbally assaulted the Dean. He was then charged and convicted below of trespassing. He now contends that a hearing should have been held prior to the Dean's notice of requirements for entry. It is submitted that the college administration can rightfully act to protect the safe and orderly education process and did so in this instance.

As a public institution, the Board of Trustees of the College is vested with administrative control of the college and holds same in trust for the public good. N.J.S.A. 18A:64-6.[3] Defendant by his conduct on campus created more than a discordant tone, he prevented fellow students from pursuing their education free from the threat of violence. Moreover, he repeatedly prevented college faculty and staff from effectively engaging in their occupations by interfering with their schedules and duties. After being placed on probation he withdrew from the college. Thereafter, the threat of expulsion removed, he proceeded to continue to conduct himself in a manner contrary to the accepted standards of behavior. The Dean, charged with maintaining the welfare of the student body, notified him that such conduct would not be tolerated.

Our courts have long recognized the right and the obligation held by school administrators and the public in general to conduct educational institutions free from interference from non-matriculating forces. *See e.g. Merkey v. Board of Regents of State of Florida,* 344 F. Supp. 1296 (D.C. Fla. 1972), *vacated,* 493 F. 2d 790 (1974), *rehearing denied,* 496 F. 2d 878 (1974); *Cholmakjian v. Board of Trustees of Michigan State University,* 315 F. Supp. 1335 (D.C. 1970). The same principle was adopted in New Jersey in *State v. Karr,* 119 N.J. Super. 385 (App. Div. 1972), *cert. den.* 62 N.J. 68 (1972). In *Karr,* non-students distributing anti-war literature were ordered from school property. No administrative hearing was conducted. When the individuals persisted they were charged and convicted of trespassing. The Appellate Division upheld the convictions and the Supreme Court denied certification, holding that the administration acted properly in prosecuting the individuals

---

3. N.J.S.A. 18A:64-6, in relevant part, provides that the Board of Trustees shall have general supervision over and shall be vested with the conduct of the college. It has the power and duty to make and promulgate such rules, regulations and orders necessary and proper for the administration and operation of the college and the carrying out of its purposes.

involved. The courts were bound to preserve the exercise of administrative control in maintaining school safety and decorum. *Id.* at 388.

Further support for the State is provided by *Kirstel v. State,* 13 Md. App. 482, 284 A. 2d 12 (1971), *appeal dism'd,* 409 U.S. 943 (1972). In *Kirstel* the Court was concerned with the constitutionality of a state statute which delineated a crime of trespass on public educational institutions. At bar, the statute involved is of general application. However, *Kirstel,* a non-student, claimed that he was entitled to an administrative hearing prior to being prohibited by the Supervisor of campus security to come upon campus grounds. The Court disagreed and held:

> "If a person either before or after he has received notice denying him access persists in conduct which violates the criminal proscriptions of the statute, he thereby waives his right to an administrative hearing, where it may seem applicable, electing to have the questions of 'lawful business' or 'disruptive acts' determined by the trier of fact in a criminal trial." *supra,* 284 A. 2d at 15.

It is respectfully submitted that, assuming *arguendo* a hearing may have been in order, defendant by his conduct waived any right to same. He did not seek to make an appointment with Dean Kerr to discuss the letter or to set a time for a hearing. Rather, he sought and gained entry to the Dean's office unannounced, cursed at him, screamed at him, and berated him. It is beyond question that he acted unreasonably and without regard to the property rights of others, as he invaded the private office of the Dean, not mercly the public walkways. *See State v. Besson,* 110 N.J. Super. 528, 539 (Law Div. 1970).

It is defendant's own behavior after the notification by Dean Kerr that factually and legally supports his conviction, as has been held by the Appellate Division of the Superior Court and the Supreme Court of New Jersey. The State submits that this Court should so hold and deny the issuance of the writ of certiorari.

II.

The letter of February 3, 1978 sent to defendant after his matriculation ceased is not an educational record and its release by the maker is not in violation of 20 U.S.C.A. §1232g(b)(2)(B).

Defendant argues that the letter received from Dean Kerr advising him to notify the college if he intended to use campus facilities is an educational record and its release is governed by 20 U.S.C.A. §1232g(b)(2)(B). The State respectfully submits that this argument is misplaced.

At the outset, defendant was not matriculating at the college on February 3, 1978 so the letter is not part of his educational record. Moreover, the statute excludes by definition those documents of administrative personnel which are in sole possession of the maker.[4] Clearly this letter is within the description of excluded records.

Finally, it must be noted that, even if the letter in question could be construed as an educational record, its production in court did not violate 20 U.S.C.A. §1232g(b)(2)(B). The information contained therein already was known to many people on campus, including administrators and campus security. These individuals learned of this information without resort to the document itself. *See Frasca v. Andrews,* 463 F. Supp. 1043 (D.C.N.Y. 1979). Further, its production in court

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4. *See,* 20 U.S.C.A. §1232g(a)(4)(B)(i) which provides the only definition of the term "educational records."

was subsequent to the testimony of various witnesses who detailed defendant's conduct and the resulting administrative response.

Defendant, who entered the Dean's office screaming about the letter, cannot now argue that it was the Dean who first released its contents to the public. The document was an administrative directive outside the statutory scope of 20 U.S.C.A. §1232g(b)(2)(B). Many people were aware of this directive and it was further discussed by the defendant in public. The State submits that based on the above, this argument must also fail.

III.

The petitioner has not demonstrated grounds sufficient to grant certiorari.

U.S. Sup. Ct. Rule 19, 28 U.S.C.A. provides that certiorari will only be granted if the character of the reasons in support thereof fall into one or more enumerated categories. In consideration of those categories, it must be recognized that the decision below is not in opposition to any applicable decisions of the Supreme Court of the United States. It is not in conflict with applicable state laws. Furthermore, the only important constitutional question presented by the facts of this case, defendant's claim to a formal administrative hearing, has been demonstrated to be without merit. The instant case is one involving a simple trespass. Whatever Fourteenth Amendment issues may have arguably been involved were vitiated by defendant's decision to commit a criminal act and seek his forum in a court of criminal justice.

The State therefore submits that there has been no showing on the part of the defendant that there are special and important reasons to grant certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to the judgment and opinion of the Appellate Division.

Respectfully submitted,

EDWARD J. TURNBACH
Ocean County Prosecutor

BARBARA ANN VILLANO
Assistant County Prosecutor
Of Counsel

EDWARD J. TUCKER
Law Clerk
On the Brief

APPENDIX

LETTER OF FEBRUARY 3, 1978 FROM KENNETH KERR, DEAN OF STUDENTS AT OCEAN COUNTY COMMUNITY COLLEGE TO PETITIONER, BERNARD LAUFGAS

OCEAN COUNTY COLLEGE

Toms River, N.J. 08753
Tel. 201-255-4000

February 3, 1978

Mr. Bernard Laufgas
P.O. Box 98
Barnegat, N.J. 08005

Dear Mr. Laufgas:

This will serve as official notice that your presence is hereby prohibited from the campus of O.C.C. unless prior approval is received from this office. Such action is necessitated because of your repeated threats of physical harm directed toward a student, the latest occurring on Thursday, February 2, 1978, which was witnessed by several others.

Such behavior can only be considered disruptive to the safety and well-being of students, and disruption of an on-going co-curricular activity.

Since you are no longer a student, if there is any legitimate reason for your presence on campus, it will be necessary for you to receive permission from the Dean of Students or the Assistant Dean of Students after first setting forth the specific time involved and the specific nature of your visit. Without such

Letter of February 3, 1978 From Kenneth Kerr, Dean of Students at Ocean County Community College to Petitioner, Bernard Laufgas

permission, you will be considered trespassing and the college security force has been instructed to escort you from the campus.

Sincerely,

s/ Kenneth Kerr
(Dr.) Kenneth Kerr
Dean of Students

KK:ar
cc: Dr. Moreland
Mr. Franklin Berry, Jr.
Mr. John Whalen, Chief of Security

JUDGMENT OF THE MUNICIPAL COURT OF DOVER TOWNSHIP ENTERED BY HONORABLE FRANCIS X. HALLIGAN ON APRIL 18, 1978

MUNICIPAL COURT OF THE Township of Dover, County of Ocean,

STATE OF NEW JERSEY

TRANSCRIPT ON APPEAL

STATE OF NEW JERSEY

vs.

BERNARD LAUFGAS

Defendant.

February 10, 1978 Complaint having been duly made by Dean Kenneth Kerr, O.C. College of the Township of Dover County of Ocean New Jersey, that the above named defendant, of the Town of Barnegat County of Ocean New Jersey, did, on the 9th day of February, 1978, commit the offense of 2A:170-31-Trespass onto premises of O.C. College after being told prohibited to do so by Certified mail; 2A:170-29.2b: Come into the office of the Complainant unannounced for the purposes of annoying and molesting; 2A:170-26: Assault upon the Complainant by repeatedly pointing his finger in face of Complainant;

February 10, 1978 A warrant was thereupon issued.

Judgment of the Municipal Court of Dover Township Entered by Honorable Francis X. Halligan on April 18, 1978

February 15, 1978	Same was duly served and return made thereon.
February 16, 1978	The defendant did plead not guilty.
February 15, 1978	He was admitted to (cash) bail in the sum of $100.00 dollars, to appear on the 6th day of March, 1978. The name and address of the surety thereon is (are): Self
	The following adjournments were granted: From March 6, 1978 to March 20, 1978 to April 12, 1978 to April 19, 1978
April 19, 1978	He was tried by the court and found guilty as charged and a judgment of conviction entered.
	Witnesses for the state: Ieda Weimmer, Pat Levine, Harry Ash, Michael Manger
	The following exhibits were produced at the trial: SI-letter certified receipt SII-letter to Dean
April 19, 1978	The defendant was sentenced as follows: 2 yrs un sup Prob. 2A:170-31-7 days O.C. Jail Susp. $50.00 Fine 15.00 Costs 2A:170-29.2b & 2A:170-26 Same as above Total $150. plus $45 Costs — Paid $100. Bal $95.00

RA5

Judgment of the Municipal Court of Dover Township Entered by Honorable Francis X. Halligan on April 18, 1978

April 25, 1978	Notice of Appeal was duly served and filed and the prosecuting attorney notified thereof. Indigency filed

JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY ENTERED BY HONORABLE MARK ADDISON, J.S.C., ON JUNE 23, 1978

OCEAN COUNTY COURT
CRIMINAL DIVISION
APPEAL NO. 81-77

STATE OF NEW JERSEY

VS

BERNARD LAUFGAS

Defendant

The defendant having appealed a conviction entered by the Municipal Court of the Township of Dover on April 19, 1978, and this Court having conducted a plenary trial de novo on the record, and this Court having rendered a judgment of guilty on the charge of violation 2A:170-31 (TRESPASS) and 2A:170-29.2b (OFFENSIVE LANGUAGE)

It is on this 23rd day of June 1978, ORDERED AND ADJUDGED that the defendant be and is sentenced to pay a fine of $50. plus $15. costs for each violation. (Total $100. plus $30.) Partial payment of $100. previously paid to the Municipal Court. Balance of $30. to be paid to the Ocean County Sheriff within 30 days. Court found the deft. NOT GUILTY of violation 2A:170-26 (A & B)

Attorney for Defendant

Frank A. Buczynski, Jr., Esq.

Judgment of the Superior Court of New Jersey Entered by Honorable Mark Addison, J.S.C., on June 23, 1978

s/ Kenneth Burdge
E. KENNETH BURDGE, County Clerk

s/ Mark Addison
JUDGE
HON. MARK ADDISON, J.C.C.

DATE: June 26, 1978
cc: Prosecutor
Sheriff

JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION ENTERED ON OCTOBER 22, 1979

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1404-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BERNARD LAUFGAS,

Defendant-Appellant.

Argued October 9, 1979 Decided Oct. 22, 1979.

Before Judges Seidman and Michels.

On appeal from the Ocean County Court.

Mr. Bernard Laufgas, appellant, argued the cause *pro se.*

Mr. Vincent J. Grasso, Assistant Prosecutor, argued the cause for respondent (Mr. Edward J. Turnbach, Ocean County Prosecutor, attorney; Mr. Douglas C. King, Assistant Prosecutor, of counsel, Mr. Robert W. Scott, Assistant Prosecutor, on the brief).

PER CURIAM.

Judgment of the Superior Court of New Jersey, Appellate Division Entered on October 22, 1979

On the complaint of Dr. Kenneth Kerr, Dean of Students at Ocean County College, defendant was charged with being a disorderly person in violation of *N.J.S.A.* 2A:170-31, *N.J.S.A.* 2A:170-29(2)(b) and *N.J.S.A.* 2A:170-26. The specific acts with which defendant was charged in the complaint were: (1) trespassing on the campus of Ocean County College after having been forbidden to do so, (2) entering Dean Kerr's office to annoy and molest him and (3) assaulting Dean Kerr by "repeatedly point [ing] his finger into the face of the Complainant." Defendant was found guilty in the Municipal Court of the Township of Dover on all three charges and was fined $50 for each conviction, plus costs. Defendant also was given a suspended seven days sentence on each conviction and placed on unsupervised probation for two years on the condition that he not enter the college grounds or campus or interfere in any way with the students or faculty thereon. Defendant appealed to the Ocean County Court, where after a trial *de novo* on the record below, he was acquitted of the assault and found guilty of trespass and "offensive language." The county court judge acquitted defendant of assault concluding that "shaking his fingers in the face of someone else during the course of an argument . . . does not constitute assault." Defendant again was fined $50 plus costs for each conviction, and this *pro se* appeal followed.

According to the State's proofs, defendant, a student at the Ocean County College had complained to Dean Kerr sometime in September 1977 about the college's lack of attention to and support of the cross country team and was critical of Dean Kerr's handling of the problem. This and other complaints continued during the semester with defendant making demands of the college and having confrontations with students and college staff. Reports were received of defendant's threatening and abusive manner and conduct and in November 1977

defendant was placed on probation for disrupting a college recruiting function. Defendant left Ocean County College. Notwithstanding the fact that defendant was no longer a student at the college, he returned to the campus the following semester and threatened a student. As a result, Dean Kerr wrote to defendant on February 3, 1978 and banned him from the campus and warned him that he would be considered a trespasser if he came upon the campus without permission. Dean Kerr's letter explicitly provided:

> This will serve as official notice that your presence is hereby prohibited from the campus of O.C.C. unless prior approval is received from this office. Such action is necessitated because of your repeated threats of physical harm directed toward a student, the latest occurring on Thursday, February 2, 1978, which was witnessed by several others.
>
> Such behavior can only be considered disruptive to the safety and well-being of students, and disruption of an on-going co-curricular activity.
>
> Since you are no longer a student, if there is any legitimate reason for your presence on campus, it will be necessary for you to receive permission from the Dean of Students or the Assistant Dean of Students after first setting forth the specific time involved and the specific nature of your visit. Without such permission, you will be considered trespassing and the college security force has been instructed to escort you from the campus.

Judgment of the Superior Court of New Jersey, Appellate Division Entered on October 22, 1979

On February 7, 1978 defendant, without prior permission, entered upon the college campus, charged into Dean Kerr's office, screaming and berating him for having sent the letter and using foul and obscene language. Defendant's conduct is explicitly described by Dean Kerr as follows:

> A. I got to work about 8:00 o'clock, was working on my — at my desk for the first hour. The door was almost completely closed, although I don't think it was shut completely. It was closed, but not — the latch wasn't holding, and Mr. Laufgas came literally charging into my office, screaming, and stood approximately two or three inches away from where I was seated, and just started to berate me and scream and holler.
>
> Q. And what was he saying?
>
> A. Well, he was initially obviously upset about the letter which I had sent him banning him from the campus, and that was the basis for his concern and he just ran for about five to ten minutes.
>
> Q. Did he direct obscenities at you?
>
> A. Yes, he did.
>
> Q. Do you recall what these obscenities were?
>
> A. Yes—

Judgment of the Superior Court of New Jersey, Appellate Division Entered on October 22, 1979

> Q. Will you tell us, please, what they were, what he said?
>
> * * *
>
> A. "You bastard, you Mother f---er, how dare you ban me from the campus, I'll bash your teeth in-" and just repeated, "You Mother f---ing bald headed bastard, I'll bash your teeth in. You have no right to deal with me this way. Why did you send me the letter", again, and again and again, just constant. And "You God damned son-of-a-bitch bastard", you know — on and on.

Defendant seeks a reversal of his convictions for trespass and "offensive language" on the following grounds set forth in his *pro se* brief:

> POINT I OCEAN COUNTY COLLEGE IS A PUBLIC INSTITUTION OPEN TO THE GENERAL PUBLIC, CONSTITUTIONAL PRINCIPALS, OF EQUAL PROTECTION AND DUE PROCESS REQUIRES, AS A MINIMUM, NOTIFICATION OF A VALID REASON TO EXCLUDE A PARTICULAR PERSON, AND AN OPPORTUNITY TO REFUTE THAT REASON BEFORE THAT PERSON MAY BE BANNED FROM COLLEGE GROUNDS.
>
> POINT II THE STATE HAS FAILED TO SHOW THAT THE LETTER BANNING DEFENDANT FROM COLLEGE CAMPUS WAS ISSUED BY ONE WHO HAS THE POWER TO BAR NON-STUDENT MEMBER OF THE GENERAL PUBLIC FROM COLLEGE CAMPUS.

POINT III SINCE DEFENDANT WAS INITIALLY CHARGED WITH TRESPASSING BY BEING ON CAMPUS AFTER NOTICE BARRING HIM FROM SAID CAMPUS, AND SINCE THE COMPLAINANT WAS NOT LATER AMENDED A FINDING OF GUILT, ON THE TRESPASS CHARGE FOR HIS PRESENCE IN THE DEAN OF STUDENTS OFFICE IS INVALID, AS VIOLATIVE OF DEFENDANT'S DUE PROCESS RIGHTS TO BE NOTIFIED OF THE CHARGE AGAINST HIM.

POINT IV SINCE DEFENDANT WAS GIVEN NO VALID NOTICE, BANNING HIM FROM THE DEAN OF STUDENTS OFFICE, THE STATE HAS FAILED TO PROVE AN ELEMENT OF THE COMPLAINT THAT THE DEFENDANT TRESPASSED ON PROPERTY, AFTER THE OCCUPANT FORBID ENTRY.

POINT V SINCE DEFENDANT WAS INITIALLY CHARGED WITH THE PURPOSE OF ANNOYING AND MOLESTING, A PERSON LAWFULLY, IN A PLACE AND SINCE STATUTE DOES NOT READ (PURPOSE), AND SINCE THE COMPLAINT WAS NOT LATER AMENDED, A FINDING OF GUILT ON THE OFFENSIVE LANGUAGE CHARGE IS INVALID AS VIOLATIVE OF DUE PROCESS RIGHT TO THE NOTIFIED OF THE CHARGE AGAINST HIM, AND THE COMPLAINT DOES NOT CONTAIN AND EMBRACE HIS ELEMENT OF THE OFFENSE, WHICH DEFENDANT WAS CHARGED WITH.

and in his *pro se* supplemental brief:

Judgment of the Superior Court of New Jersey, Appellate Division Entered on October 22, 1979

POINT VI HAS THE STATE VIOLATED DEFENDANT RIGHTS BY USE OF ILLEGAL EVIDENCE, NAMELY LETTER OF FEB 3, 1978, AND DEFENDANT ATTORNEY'S DID NOT MOVE TO SUPPRESS, THE EVIDENCE.

POINT VII THE STATE HAS STIPULATED AT A COURT OF LAW, AS TO WHAT PROCEDURES THE DEAN OF STUDENTS USED, WHEN HE, THE DEAN, BANNED DEFENDANT FROM THE CAMPUS OF OCEAN COUNTY COLLEGE.

We have carefully considered all of defendant's arguments addressed to these contentions and find, with the sole exception of the attack upon his conviction for using "offensive language" discussed in Point V, *infra,* that they are clearly without merit. *R.* 2:11-3(e)(2). Accordingly, defendant's conviction for trespassing upon the Ocean County College campus in violation of *N.J.S.A.* 2A:170-31 is affirmed.

However, there is merit in defendant's challenge to his conviction for using "offensive language" discussed in Point V, *infra.* The thrust of defendant's attack stated simply is that he was not charged with the offense for which he was convicted. The complaint charged defendant with a violation of *N.J.S.A.* 2A:170-29(2)(b) "in that he did come into the office of the Complainant [Dean Kerr] unannounced for the purpose of annoying and molesting a person lawfully therein." He was tried and found guilty in the municipal court of that offense. Notwithstanding the fact that he had not been charged with using "offensive language", the county court judge on a *de novo* review on the record below, without amending the complaint, found him guilty of using "offensive language."

Judgment of the Superior Court of New Jersey, Appellate Division Entered on October 22, 1979

It is settled beyond dispute that a defendant may not be charged with one offense and tried and convicted of another. See *State v. Williamson,* 54 *N.J. Super.* 170, 185-186 (App. Div. 1959, aff'd 31 *N.J.* 16 (1959); *State v. Wein,* 162 *N.J.Super.* 159, 164 (App. Div. 1978), and *State v. Begyn,* 58 *N.J.Super.* 185, 198 (App. Div. 1959), aff'd on other grounds 34 *N.J.* 35 (1961).

N.J.S.A. 2A:170-29, in pertinent part, provides:

> 1. Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance, or place in which the public is invited; or
>
> 2. Any person who in any place, public or private,
>
> a. Addresses or makes audible and offensive remarks to or concerning any passing person; or
>
> b. Obstructs, molests or interferes with any person lawfully therein; or
>
> * * *
>
> Is a disorderly person.

The use of "offensive language" and molesting and interfering with a person proscribed by the foregoing section of the Disorderly Persons Law are separate and distinct offenses. See *State v. Profaci,* 56 *N.J.* 346, 353 (1970), which discusses the language of the "offensive language" under *Subsection* (1) and *State v. Lashinsky,* 81 *N.J.* 1, 9 (1979) and *State v. Manning,*

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146 *N.J. Super.* 589, 593-594 (App. Div. 1977), which discusses the elements of molesting or interfering with a person under *Subsection* (2)(b). Here, it is perfectly obvious that defendant was charged with one offense and convicted of another.

We do not agree with the State's claim that the reference to "offensive language" was "obviously a shorthand way of describing the violation under *N.J.S.A.* 2A:170.29." A careful review of the county court transcript reveals that the county court judge and counsel for both the State and the defendant for some inexplicable reason were apparently under the impression that defendant was charged with using "offensive language" in violation of *N.J.S.A.* 2A:170-29 (1). The following colloquy between the county court judge and defense counsel emphasizes the misunderstanding as to the nature of the charge:

> THE COURT: How about the question of offensive language which you haven't touched?
>
> MR. BUCZYNSKI: Your Honor, I believe the offensive language, the question comes to mind whether or not this was public or private. The door was opened. There were a number of people around who could hear it. After reading the case law, and I really could not find that the language itself was not offensive to the people who were standing nearby.

At the conclusion of the argument, the county court judge found "[T]here is no question but on the basis of the testimony he certainly used pretty offensive language" and thereafter in imposing sentence prefaced his remarks stating, "[a]s to the offensive language, the fine of $50 and $15 is warranted." Finally, the judgment of conviction made specific reference to

"offensive language." In these circumstances, we cannot conclude that defendant was properly convicted of molesting and interfering in violation of *N.J.S.A.* 2A:170-29(2)(b). Accordingly, defendant's conviction for using "offensive language", cannot stand and is reversed.

As modified, the judgment of conviction is affirmed. The matter is remanded to the Ocean County Court for the entry of an appropriate amendatory judgment. We do not retain jurisdiction.

DENIAL OF CERTIFICATION BY THE SUPREME COURT OF NEW JERSEY ENTERED ON FEBRUARY 11, 1980

SUPREME COURT OF NEW JERSEY
C-422 SEPTEMBER TERM 1979

ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BERNARD LAUFGAS,

Defendant-Petitioner

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1404-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 11th day of February, 1980.

s/ Stephen W. Townsend
STEPHEN W. TOWNSEND,
CLERK